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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NICHOLAS BOYD, Plaintiff and Appellant, v. SBC ADVANCED SOLUTIONS, INC., Defendant and Respondent.	B181807 (Los Angeles County Super. Ct. No. BC263588)

APPEAL from a judgment of the Superior Court of Los Angeles County. Conrad R. Aragon, Judge. Affirmed in part and reversed in part.

Law Office of Richard T. Ferko and Richard T. Ferko for Plaintiff and Appellant.

AT&T West Legal Department and Gleam O. Davis for Defendant and Respondent.

Nicholas Boyd (Boyd) sued SBC Advanced Solutions, Inc. (ASI), for damages after one of its technicians, in the process of installing a digital service line (DSL), erased three screenplay projects from Boyd's computer. The jury awarded Boyd $27,000 in net compensatory damages on his negligence cause of action and $33,000 in punitive damages. Boyd appeals on the following theories: (1) there is insufficient evidence to support the jury's decision to award such a low amount of compensatory and punitive damages; (2) there was insufficient evidence for the jury to apportion 55 percent of the fault to Boyd; (3) contributory negligence does not apply in negligence actions involving injury to property; and (4) the trial court erred when it refused to reopen the case to admit exhibit 105. ASI cross-appeals, claiming, inter alia, that the award of punitive damages was improper because the special verdict form allowed the imposition of punitive damages only if it was found liable for an intentional tort. Because the cross-appeal has merit but the appeal does not, we reverse the punitive damages award. In all other respects, the judgment is affirmed.

FACTS

The complaint

Boyd alleged the following facts and theories.

Boyd, also known as Nikrouz Ghazibayat, spent years researching and preparing scripts[1] and stories entitled "Color of Tulip," "Blood on Ice," and "Blood on Seven Hills"[2] (projects). He entered into relationships and contracts with production companies and publishing companies to produce and publish the scripts and stories. On December 14, 2000, ASI sent a technician to provide an internet connection and DSL installation for

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[1] The words "scripts" and "screenplays" are used interchangeably in this opinion.

[2] According to the opening brief, "Blood on Seven Hills" is also known as "Genocide." This conflicts with testimony suggesting that "Blood on Ice" was about genocide and that "Blood on Seven Hills" was about Mussolini. Regardless, any reference to a story entitled "Genocide" refers to one of the three stories encompassed by the projects.

Boyd. The technician negligently performed work on Boyd's computer so as to delete his scripts, stories, treatments and information. Boyd attempted to contact ASI on numerous occasions, but he was repeatedly put on hold, cut off and even laughed at. Thereafter, ASI and others negligently attempted to recover the lost information and caused it to be permanently lost.

ASI knew the technician was unqualified, and its supervision was grossly negligent. It also knew the nature and importance of the information on Boyd's computer.

Boyd alleged causes of action for negligence, gross negligence, breach of contract, conversion, fraud, and interference with prospective economic advantage.

The trial

When the trial commenced, Boyd announced that he would be proceeding on causes of action for negligence, fraud, and negligent and intentional interference with prospective economic advantage. In the main, Boyd's case was comprised of his testimony and the testimony from Edward Krapivsky (Krapivsky) and Boris Moshkovits (Moshkovits).

ASI called Michael Robert Gale (Gale) as an expert. An important part of ASI's defense was the cross-examination of Steven Gary Burgess (Burgess), a data recovery specialist.

Boyd

Boyd testified that he spent years working on "Color of Tulip," "Blood on Ice," and "Blood on Seven Hills."[3] He estimated that he spent $60,000 to $70,000 researching and creating those projects. On December 14, 2000, ASI sent James Kassenborg (Kassenborg) to install DSL in Boyd's home. While working on Boyd's computer, Kassenborg said that certain icons and files were not needed and deleted them. A data

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[3] In his opening brief, Boyd states that "[t]hese scripts, stories and treatments were inputted on his computer." Boyd did not provide a record citation for this factual assertion.

recovery specialist could recover no more than bits and pieces of Boyd's scripts, stories and treatments; whole drafts were unrecoverable.

As told by Boyd, Krapivsky agreed to produce "Color of Tulip," "Blood on Ice," and "Blood on Seven Hills" for $2.7 million. On cross-examination, Boyd was unable to recall the date when Krapivsky first orally agreed that they had a deal. However, Boyd did say that sometime prior to December 27, 2000, was when Krapivsky agreed on behalf of Aurora Media to produce the projects. Later in his testimony, Boyd was asked about an e-mail that he sent to Krapivsky in January 2001.

The e-mail stated: "Please let me know how long do I have time to rewrite the screenplay 'Genocide' and if my fee, which was noted in the budget (already submitted), is acceptable to you. For Hollywood standards, it is really a minimum for that kind of a big, huge, full feature-length motion picture true story never made before, all three my stories with the present special effects techniques, animation. . . . [¶] . . . [¶] Excellent cast, 'A'-rated actor, and 'A'-rated director, and a good production staff will bring over a billion U.S. through the box office revenue, domestically, internationally, internet, syndicated network, and video. If I would participate as a co-producer and/or consultant in all three projects, I guarantee you the projects will be far better than the movies 'Gladiator,' 'Schindler's List[,]' or ['Ben Hur.'] As you know, these films brought over a billion dollars each. Again, it is completely at the discretion of the production team to decide."

Continuing on, the e-mail read: "In conclusion, please give me an idea just how much your company would consider what all my three screenplays are worth to your company and when I would get paid. I spent great deal of money and risk and time for research. I really have to know. I need development money to finish and to send you the script ASAP. As you know, it falls under the guidelines of the Screenwriters Guild of America."

Boyd was asked whether it was true that, according to this e-mail, he still did not know how much Krapivsky was going to pay for the scripts. Boyd replied: "No, we knew that. It was already set. Usually you go double sold is a better sold. So at the

end—see, he wanted me to recreate." When Boyd was asked if he sent the e-mail to get an idea of how much Krapivsky's company would consider paying, Boyd asked if it was a rhetorical question. The trial court told Boyd not to argue and to answer the question. Instead of answering yes or no, Boyd said he wrote the e-mail to highlight the financial rewards of increasing the budget and hiring A-list actors and directors. He also said he wanted to cover himself because a friend told him to put things in writing.

Asked if he was a member of the Writers Guild of America,[4] Boyd testified: "I was [a] member of Screenwriter Association of America with hall of fame, with much more famous, more members."[5]

Boyd admitted that before and since December 14, 2000, he has never received compensation as a screenwriter or producer.

Krapivsky

Krapivsky explained that he is a freelance producer for Aurora Media, and his job is to seek out and manage projects. The company, which is based in Berlin, Germany, made films like "American Werewolf in Paris," among others. After Krapivsky saw the draft script for "Color of Tulip," the treatment for "Blood on Ice," and the synopsis for "Blood on Seven Hills," he brought them to the attention of Alexander Bookman (Bookman), the owner of Aurora Media. Bookman decided he wanted to pursue the projects, so Krapivsky informed Boyd that Aurora Media was interested in working with

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[4] The Writers Guild of America is a union for professional writers, including screenwriters. It is involved with contract negotiations with producers and studios on behalf of its members. (See www.wga.org.) The Screenwriters Guild of America, referenced in Boyd's January 2001 e-mail, is now known as the Screenwriters Federation of America. It is designed to help professional and aspiring screenwriters market their work. Membership is open to anyone who sends in an application and pays dues. (See www.screenwritersfederation.org.)

[5] The American Screenwriters Association was organized to promote and encourage screenwriting. Membership is open to anyone who sends in an application and pays dues. (See www.asascreenwriters.com.)

him. Afterwards, Boyd sent a contract and budget proposal to Aurora Media providing that he would be paid $900,000 for each of the three scripts and related productions.

According to Krapivsky, he called Boyd in November 2000 and said Bookman was "willing to do it if [you] will provide us with the scripts." Krapivsky told Boyd he would be paid $2.7 million. In particular, Krapivsky testified: "I . . . said that generally we liked the idea, we see great potentials [*sic*], and we would like to proceed with this projects [*sic*] and we would like to receive the scripts as soon as possible. I told [Boyd] the situation in Germany is very good with the funds, that financing could be secured, and so on."

The idea was to go into the German tax shelter market for funding for the movies. In order to get financing for a movie from a German tax shelter fund, Krapivsky needed a completed screenplay, proven professionals with track records in the film industry, a completion bond, and a production services agreement. However, he never received any screenplays from Boyd, and he did not have any directors identified. He admitted that could not get a completion bond without a screenplay. Even if he had a screenplay, he testified that it would have to be presented to the completion bond company, which could always decline to issue a completion bond. Also, a German tax shelter fund could decide that it did not want to invest in the movie project.

Krapivsky testified that the managers of the German tax shelter funds (fund managers) would have to approve how much the director was paid and how much the producer staff was paid. He was asked, "And isn't that also true for deciding how much you are going to pay the screenwriter?" He answered, "Well, in terms of screenwriter, we knew how much we have to pay." He did not provide a further response.

Moshkovits

According to Moshkovits, Aurora Media agreed to pay Boyd a third upon delivery of a particular screenplay, a third upon production and a third as each movie project was completed.

Burgess

Burgess owns a company called Burgess Consulting and Forensics. It does data recovery, computer forensics, data transfer and conversion. Boyd asked Burgess to recover data from a hard drive and he agreed. ASI promised to pay for the recovery effort.

Ultimately, Burgess was able to find part of one screenplay on the hard drive, but nothing else useful.

On cross-examination, Burgess testified that 4,134 files were placed on Boyd's computer between December 13, 2000, and January 13, 2001. Most were added after December 20, 2000. Those files potentially took up unallocated space where previously deleted files, including Boyd's deleted stories, treatments and screenplays, might have been residing. The addition of 4,134 files created a significant risk that allegedly lost material would be overwritten. If the stories, treatments and screenplays were completely overwritten, they were rendered unrecoverable. It is possible that the lost material could have been recovered prior to the installation of the 4,134 files on Boyd's computer.

Some of the new files Burgess found belonged to Textbrige Pro 8.0 and Photosuite software. Burgess inferred that someone had downloaded Napster and Realplayer files during the same timeframe.

Gale

Gale testified that he is a member of the Writers Guild of America, which is a union for writers, including screenwriters. The Writers Guild of America sets compensation standards. In December 2000, at a minimum, a writer would be paid $30,000 on low budget movie and $60,000 on a high budget movie. A writer could try to negotiate higher pay.

Boyd's motion to reopen the case and admit exhibit 105 into evidence

After closing argument, Boyd moved the trial court to reopen the case in order to admit exhibit 105 into evidence. The motion was denied.

Exhibit 105 is a document entitled "SBC Executive Appeal" and pertains to a customer complaint by Boyd. It states, in part: "Attorney is handling this issue on behalf

of [Boyd]. One of our employees showed up to install DSL, spent 8 hours there going through files and wiped out [Boyd's] whole computer. We fired the employee and Mr. Jack McGovern sent a letter stating ASI would pay [Boyd] any fees he incurred for data recovery. [Boyd] is a script writer and has scripts he needs to recover that will eventually be worth in excess of $10 million."[6]

Jury Instructions

Among other instructions, the trial court gave specific instructions pertaining to contributory negligence and damages.

"ASI claims that [Boyd's] harm was caused in whole or in part by [Boyd's] own negligence. To succeed on this claim, ASI must prove both of the following: [¶] 1. That [Boyd] was negligent; and [¶] 2. That [Boyd's] negligence was a substantial factor in causing his harm. [¶] If ASI proves the above, [Boyd's] damages are reduced by your determination of the percentage of [Boyd's] responsibility. I will calculate the actual reduction."

"If you decide that [Boyd] has proved his claim against ASI, you also must decide how much money will reasonably compensate [Boyd] for the harm. . . . [¶] . . . [¶] The following are the specific items of economic damages claimed by [Boyd]: [¶] 1. Out-of-Pocket Losses [¶] [Boyd] may recover amounts that he reasonably spent in allegedly creating three screenplays which were then allegedly lost as a result of wrongdoing by ASI. [¶] 2. Lost Prospective Earnings. [¶] To recover damages for lost prospective earnings, [Boyd] must prove the amount of income or earnings that he has lost to date."

The special verdict

The special verdict form asked 27 questions. Regarding negligence, the jury answered yes to questions one through four, indicating that it found that Kassenborg and ASI were negligent and caused Boyd damage. Additionally, the jury found that Boyd was negligent, his negligence was a substantial factor in causing his damage, and the

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6 The quoted document is not marked as exhibit 105. However, both parties agree that this document is exhibit 105.

proportion of his fault was 55 percent. ASI was held not liable for fraud, intentional interference with prospective economic advantage and negligent interference with economic advantage.

Question 26 asked the jury to assess Boyd's total damages. The jury determined that his damages amounted to $60,000. If, and only if, ASI was held liable for fraud, intentional interference with prospective economic advantage or both, the jury was supposed to answer question 27. That question asked whether ASI engaged in conduct with malice, oppression or fraud. Even though the jury did not find ASI liable for either fraud or intentional interference with prospective economic advantage, the jury answered "yes" to question 27.

The punitive damages phase of trial

Before the punitive damages phase of trial, ASI argued that punitive damages were not available in a simple negligence case due to the lack of malice. The trial court disagreed, stating: "Well, that overlooks the jury's finding on question number eight [pertaining to the fraud cause of action]. They specifically found that [ASI] lied to [Boyd].[7] They also found in questions one through six . . . that [Kassenborg] deleted the screenplays. And then they found on question number 27 that [ASI's] conduct was engaged in with malice, oppression or fraud. [¶] So, as to the proposition you are advancing, that there is no factual finding to support a punitive damage award because there's no malice, oppression or fraud, that flies in the face of finding number eight." Further, the trial court concluded that the requirements of Civil Code section 3294, subdivision (b)—authorization or ratification of Kassenborg's conduct by a managing agent of ASI—was found by the jury because it found: (1) Kassenborg was acting in the scope of his employment for ASI, (2) ASI was negligent, (3) ASI made a false

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7 The jury found that ASI made an unspecified false representation of fact to Boyd. However, the jury also found that ASI did not know that the representation was false, and that it was not reckless regarding the truth.

representation of an important fact, and (4) ASI engaged in malicious, oppressive or fraudulent conduct.

In a separate special verdict form, the jury awarded Boyd $33,000 in punitive damages.

The posttrial motions

Boyd moved for a new trial on the issue of damages and punitive damages or, in the alternative, for additur to the damages and punitive damages. He argued that the evidence was insufficient to justify such low compensatory and punitive damages awards, and that it was error for the trial court to deny the motion to reopen the case to admit exhibit 105.

ASI moved for a partial judgment notwithstanding the verdict or, in the alternative, a new trial regarding punitive damages. It argued that punitive damages cannot be awarded as a matter of law based on a finding of simple negligence when the damages were economic.

The trial court issued a tentative ruling denying both motions.

As to Boyd's motion, the trial court stated: "Although Boyd produced evidence of a contract in the millions-of-dollars range through the testimony of various witnesses, the jury was free to, and obviously did, find the evidence not credible. There was evidence presented by ASI from which the jury could have so concluded, apart from the demeanor evidence of Boyd's witnesses (and their equivocations regarding the details of the 'contract'). [¶] The jury was also convinced that Boyd himself was negligent in not backing up or otherwise protecting his screenplays, finding him 55% contributorily at fault for deletion of the screenplays. The compensatory damage award of $60,000 was fully supported by the evidence. Moreover, given [Boyd's] own fault and the net compensatory recovery to [Boyd] of [$27,000], the [trial] court does not find that the punitive damage award was insufficient. [¶] Exhibit 105 was tardily submitted by Boyd, after the evidence had been settled, after argument and after instruction, upon Boyd's motion to reopen. The [trial] court reviewed the document which had not been shown to any witness and had not been previously authenticated. It was clear to the [trial] court

from the testimony of various witnesses who testified as to similar memoranda produced by ASI employees in their handling of Boyd's pre-litigation complaints, that the exhibit was drawn up to memorialize the substance of Boyd's claim, not as a memo reflecting ASI's opinions as to the merit of Boyd's claims. [¶] Finally, even if it was error [for the trial court to refuse to] admit Exhibit 105 into evidence, it was not prejudicial. The jury obviously found that ASI had deleted the screenplays. An admission to that effect would yield no different result."

As to ASI's motion, the trial court stated: The evidence supported an inference that even though Kassenborg was repeatedly warned by Boyd about the screenplays on the hard drive and of their value, he nevertheless deliberately deleted the screenplays from Boyd's hard drive. Kassenborg's conduct falls within the definition of malice, which is defined as the willful and knowing disregard of the rights of another. The trial court rejected ASI's contention that a negligence action involving economic damage could not support a punitive damage award. It cited *Nippon Credit Bank v. 1333 North Cal. Boulevard* (2001) 86 Cal.App.4th 486.

The trial court adopted the tentative ruling as its order.

This appeal and cross-appeal followed.

DISCUSSION

1. Compensatory damages.

Boyd argues that his compensatory damages award is insufficient. For the reasons discussed below, the compensatory damages award must be affirmed.

a. *The amount of damages*.

In his "Contentions on Appeal," Boyd tells us that there "is no evidence that supports the damage [amount] of $60,000.00. The unrefuted evidence presented during trial established a contract had been entered in which Boyd would receive $2.7 million. [¶] The court must consider all evidence that supports the jury finding that an economic relationship between Boyd and a movie producer existed which probably would have resulted in an economic benefit to Boyd. . . . The only economic relationship established was the $2.7 million contract."

Part I of Boyd's argument, which is entitled "There is Insufficient Evidence to Support the Damage Award of $60,000," cites four cases, which are: *Long Beach Police Officers Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1001 (*Long Beach*), *County of Mariposa v. Yosemite West Associates* (1988) 202 Cal.App.3d 791, 807 (*Mariposa*), *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 (*Estate of Teed*) and *Toyota Motor Sales, U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 (*Toyota Motor*). We examine each of these cases.

In *Long Beach*, the Long Beach Police Department (the Department), among others, appealed from a judgment ordering the issuance of a writ of mandate prohibiting it from denying the Department's officers "a 'past practice' of consultation with a [police officers association] representative or an attorney prior to making oral and written reports concerning incidents in which an officer was involved in a shooting." (*Long Beach*, *supra*, 156 Cal.App.3d at p. 998.) On appeal, the Department argued that the findings of fact in the trial court's statement of decision were not supported by substantial evidence. (*Id*. at p. 1000.) The *Long Beach* court affirmed.

On page 1001, the page cited by Boyd, the *Long Beach* court set forth the following rules: "'[[I]n resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact. [Citation.] 'In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*.' [Citation.] All conflicts, therefore, must be resolved in favor of the respondent. [Citation.]' [¶] '*Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court*. The presumption being in favor of the judgment . . . , the court must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.' [Citation.]" (*Long Beach*, *supra*, 156 Cal.App.3d at p. 1001.)

Mariposa, *Estate of Teed* and *Toyota Motor* also recite the substantial evidence test. Boyd directs us to the following language: "[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed*, *supra,* 112 Cal.App.2d at p. 644.)

Curiously, none of these cases involve challenges to the adequacy of damages. They do not support Boyd's position, which is evident when Boyd's arguments are considered. Even though Boyd cites these cases, he does not rely on them. Instead, he essentially reargues his case.

First, Boyd contends that we must accept all the evidence that Kassenborg was acting in the scope of his employment with ASI when the incident occurred, ASI was negligent, ASI's negligence caused Boyd harm, Boyd sustained damages, and Boyd and a movie producer had an economic relationship that probably would have resulted in an economic benefit to Boyd.

Second, Boyd contends: There was undisputed evidence that he entered into the agreement for $2.7 million with Krapivsky and Moshkovits. Syd Field, Boyd's film industry expert, testified that the agreement was reasonable. The minimum range of compensation for a single project, at least according to Gale, ASI's film industry expert, was $60,000. Based on these facts, a damage assessment of $60,000 is clearly not supported by the evidence.

We turn to our review.

(1) Standard of review.

"The common law in its wisdom has left [the] inherently subjective decisions regarding damages with the jury as the trier of fact to apply its collective experience, common sense, and diverse backgrounds. As a further safeguard, the trial judge has considerable discretion to review excessive or inadequate damage awards in conjunction with a motion for new trial. . . . We do not question the discretionary determinations of

jury and judge, so long as they fall within a reasonable range permitted by the evidence. [Citation.]" (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857 (*Abbott*).) We review the trial court's determination under the substantial evidence test, but we do so with deference. (*Id*. at p. 856; see also *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259 [the trial court's determination whether damages are excessive is entitled to great weight because it must balance the conflicting evidence].) "Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law." (*Gersick v. Shilling* (1950) 97 Cal.App.2d 641, 645.)

(2) Waiver: failure to discuss adverse facts.

Instead of providing a fair statement of the facts and a discussion of all the evidence, Boyd's appellate briefs focuses only on the evidence he deems favorable to his position. He omitted any reference in his briefs to the necessity of getting approvals from the fund managers and the completion bond company in order to secure funding, the January 2001 e-mail (the wording of which suggested that the parties had not agreed to a contract), and his equivocations on the stand about the meaning of the January 2001 e-mail. One-sided record citations are at cross-purposes with the appellate process, which has justice as its utmost aim and strives for fairness and efficiency. (See *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.) In this context, "the contention that the findings are not supported by substantial evidence may be deemed waived." (*Ibid*.) Due to Boyd's failure to properly cite and discuss all relevant facts, we deem this portion of his appeal waived.

(3) Waiver: failure to discuss controlling authority.

Boyd did not discuss *Abbott*, or case law similar to it.

It is important to recognize what Boyd does not argue. He does not argue that the jury verdict was the result of passion, prejudice or corruption on the part of the jury. Nor does he argue that the award was insufficient as a matter of law. Finally, Boyd does not

argue that the compensatory damages award fails to fall within a reasonable range permitted by the evidence when it is viewed in the light most favorable to ASI. We deem this portion of the appeal waived because Boyd did not support it with argument based on the controlling law. We have no obligation to be stand in lawyers and develop an appellant's arguments. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 1.)

(4) The jury's damages finding was supported by substantial evidence.

When applying the substantial evidence test, an appellate court resolves all conflicts in the evidence in favor of the prevailing party, and it draws all reasonable inferences in a manner that upholds the verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) Evidence is considered substantial if it is "of ponderable legal significance," and if it can be characterized as being "reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id*. at p. 652.)

The finding of $60,000 in damages fell within the reasonable range permitted by the evidence. It is inferable that the jury found that Boyd did not have a contract with Aurora Media, but decided that Boyd should be compensated for the money he spent researching and preparing his projects. In other words, the jury assessed damages for out of pocket losses (the first measure of damages in the jury instructions), but not lost profits (the second measure of damages in the jury instructions). Viewed in the light most favorable to ASI, the evidence showed the following. Aurora Media could not budget Boyd's compensation until his screenplays were approved by the fund managers and the completion bond company. Krapivsky told Boyd that Bookman was interested in the projects and said to send the screenplays as soon as possible. After the projects were deleted from Boyd's computer, he e-mailed Krapivsky to see if Bookman still wanted to proceed. Boyd wanted to find out how much he would be paid if he could recreate his lost material and write the promised screenplays. At that point, the parties did not have an agreement for his services.

It was also inferable that Boyd would not have delivered a screenplay. He spent many years researching, but he never completed a final screenplay for any of his projects. In his January 2001 e-mail, he stated that he needed development money to finish his screenplays. But he was not entitled to any money under the purported contract until he delivered a screenplay, as Moshkovits testified. Notably, Krapivksy wanted the screenplays as soon as possible. The jury could have reasonably inferred that Boyd would not have been able to write three professional screenplays in a short period of time (even if he received development money) because he had been unable to do so during the many years he spent on the projects and, as is apparent from a perusal of Boyd's January 2001 e-mail, his writing lacks sophistication.

Having declined to weigh in on the issues presented by the adverse evidence, Boyd cannot be heard to complain about the negative results he has achieved thus far in connection with his appeal.

b. *Apportionment of fault*.

In this part of his appeal, Boyd contends that he is entitled to 100 percent of his compensatory damages. This contention lacks merit.

Boyd advances a legal attack and an evidentiary attack. In his legal attack, he agues that fault cannot be apportioned in cases involving injury to property. In his evidentiary attack, he contends that the evidence did not otherwise support the jury's allocation of fault.

The evidentiary attack in his opening brief, in its entirety, states: "The argued basis of negligence on the part of [Boyd] was that he could have backed up his material with floppy disks. . . . This ignores the testimony by even the computer witness on behalf of the defendant that floppy disks are unreliable. . . . This ignores the fact that 'Color of Tulip' was backed up by a floppy disk. It was argued by the attorney for [ASI] that if you have something valuable you should put it in a safe deposit box. . . . Obviously, the numerous documents created by [Boyd] would not fit into a safe deposit box. [¶] [Boyd] did not reasonably expect that [ASI] would wipe out and delete documents on his computer during the DSL installation. The holding of [Boyd] to be 55% at fault for

[ASI's] deletion is wrong. [¶] . . . [¶] Further, how can Boyd be more liable than the wrongdoer. The apportionment of 55% to [Boyd] and 45% to [ASI] is not supported by evidence or law."

Below, we explicate the deficiencies of these attacks.

(1) Standard of review.

Our task is to review the jury's apportionment of fault under the substantial evidence rule, considering the evidence in the light most favorable to ASI, giving it the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1480-1481.) In carrying out our function, we are not permitted to reweigh the evidence. (*Ibid.*) "[T]he jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility." (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.) We "'may not substitute [our] judgment for that of the jury or set aside the jury's finding if there is any evidence which under any reasonable view supports the jury's apportionment. [Citation.]' [Citation.]" (*Ibid.*) "[T]he testimony of a single witness, even [of a party], may be sufficient. [Citation.]" (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.)

(2) Waiver: failure to object to apportionment of fault at the trial level.

The parties tried their respective cases, which included Boyd's cause of action for negligence and ASI's affirmative defense alleging contributory negligence. Boyd did not object to the contributory negligence instruction to the jury, nor did he object to the question relating to contributory negligence in the special verdict form. It is too late in the day for Boyd to argue that fault could not be apportioned in this case. "Contentions or theories raised for the first time on appeal are not entitled to consideration. [Citations.]" (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 685.)

(3) Waiver: failure to discuss adverse facts.

By neglecting to discuss the adverse facts—such as the evidence that 4,134 files were placed on his computer after December 14, 2000—Boyd abdicated his appellate duty. Hence, we find a waiver.

(4) The apportionment of fault is supported by substantial evidence.

Academically, we conclude that Boyd's thin analysis is insufficient.

It was Boyd's challenge to explain why the evidence most favorable to ASI was deficient as a matter of law to support the apportionment. But Boyd avoided the challenge. Once again, he simply reargued his case and presented the evidence he deemed most favorable to his position.

Giving the evidence a slant that insulates the apportionment of fault, we conclude that Boyd, or someone who had his permission, installed 4,134 files on his computer after December 13, 2000, and destroyed Burgess's ability to recover anything that may have been deleted by Kassenborg. Corollary to that, we presume that if those 4,134 files had not been installed, the files that may have been deleted by Kassenborg would have been recovered. As Boyd admits, he had "Color of Tulip" backed up on a floppy disk, so he did not lose that material. He could have easily backed up his other work on floppy disk, but he neglected to do so. Based on these facts, the jury reasonably concluded that Boyd was 55 percent at fault for his losses.

2. Denial of the motion to reopen to admit exhibit 105.

Boyd argues that it was error for the trial court to exclude exhibit 105. He relies upon *Redemeyer v. Cunningham* (1923) 61 Cal.App. 423 to support his contention. His reliance is misplaced. In *Redemeyer*, the appellate court held that it was error for the trial court to exclude evidence of actual possession of property in an action for adverse possession. (*Redemeyer*, *supra*, at p. 433.) We fail to see the relevance. *Redemeyer* was not a motion to reopen a case and is inapposite.

The law that must inform our analysis is this: "Trial courts have broad discretion in deciding whether to reopen the evidence. [Citation.] We review a court's denial of a motion to reopen evidence for an abuse of discretion. (*Ibid.*) The appropriate test for

abuse of discretion is whether the trial court's decision exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. [Citations.]" (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208-209.)

In his attempt to curry a reversal, Boyd's briefs falter. His opening brief merely argues that exhibit 105 "is a January 2001 SBC Executive Appeal document, which can be construed as admitting the technician wiped out [Boyd's] computer and was fired. This document points out the inaccurate testimony of [McGovern] and [Atterbury]. It was relevant to the reprehensibility of the conduct of [ASI] and relevant to the damage issues." Instead of arguing why the trial court abused its discretion, Boyd simply argues that exhibit 105 had relevancy. The argument rings hollow because it does not confront the trial court's findings in connection with its denial of Boyd's motion for new trial. According to the trial court, exhibit 105 was never shown to a witness or authenticated, and all it did was document the substance of Boyd's claims against ASI. In other words, exhibit 105 did not reflect ASI's opinions as to the merits of Boyd's claims. Notably, Boyd did not explain how exhibit 105 would have affected the judgment. It can be inferred that the jury believed that Kassenborg deleted the projects from Boyd's computer, but that Boyd either did not have a contract with Aurora Media, or that he would never have delivered any screenplays. Therefore, even if exhibit 105 contained admissions that Boyd could have used against ASI (which it did not), those admissions would not have changed the outcome of the trial.

Boyd waived this portion of appeal by failing to discuss the relevant issues. Though it is unnecessary for us to review the trial court's ruling, we do so in the interest of being complete. We find that the trial court ruled within the bounds of reason when it denied Boyd's motion to reopen.

3. Punitive damages.

ASI challenges the punitive damages award on several grounds, including that they cannot be awarded where the special verdict form submitted to the jury only allowed imposition of punitive damages if the facts demonstrated an intentional tort. As discussed below, we agree. Because we agree, Boyd's appeal seeking to augment his punitive damages is moot.

a. *Standard of review*.

When confronted with a question of law based on undisputed facts, our review is de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

b. *Punitive damages law*.

Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Because this action involves an employer that is a corporate entity, Civil Code section 3294, subdivision (b) is also pertinent. It provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

c. *The findings in the special verdict form do not support punitive damages*.

"It is the province and the duty of the [trial] court to instruct the jury upon the law and such instructions are binding on the latter in its deliberations. [Citation.]" (*Redo y Cia v. First Nat. Bank* (1926) 200 Cal. 161, 166.) The upshot is that the jury is not

empowered to contravene the jury instructions when rendering a verdict. (*Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 743 ["A jury is bound to follow proper instructions, and a verdict contrary thereto is against the law"].) It has been held that "a verdict which is patently contrary to the court's instructions on damages does not cover or comprehend the issues submitted and is therefore insufficient." (*Sherwood v. Rossini* (1968) 264 Cal.App.2d 926, 930, fn. omitted.) "When a verdict and judgment entered thereon are wrong as a matter of law but the case was fully tried and no new evidence is necessary, we may reverse and remand with directions to make requisite findings based on undisputed evidence and enter a new judgment accordingly. [Citations.]" (*Boam*, *supra*, 6 Cal.App.4th at p. 745 [remanding with directions to calculate the amount of prejudgment interest owed to plaintiff and enter judgment accordingly].) It follows that if new findings are not necessary, then the judgment can simply be reversed.

The trial court instructed the jury to follow the jury instructions and special verdict form carefully. Absent a finding of fraud or intentional interference with prospective economic advantage, the jury was not supposed to answer question 27 in the special verdict form (which asked whether ASI engaged in conduct with malice, oppression or fraud). Even though the jury did not find that ASI committed either intentional tort, it still answered question 27. The jury's finding of fraud, oppression or malice was not permissible, and the punitive damages award cannot stand. We therefore reverse the punitive damages award.[8]

Though we now deem the punitive damages issue resolved, our ruling is bolstered by a second observation.

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[8] ASI did not object to the defect in the special verdict below, but that does not preclude us from reaching the issue on appeal. Waiver of an objection to a jury verdict "'is not found where the record indicates that the failure to object was not the result of a desire to reap a "technical advantage" or engage in a "litigious strategy."' [Citation.]" (*DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 7.) There is no indication in the record that ASI's failure to object was a litigious strategy.

Neither party objected to the special verdict form. As a result, both parties must live with it. (See *Jensen v. BMW of North America, Inc.*, *supra*, 35 Cal.App.4th at p. 131 [objection to a special verdict form must be made before the jury is discharged or it is waived].) According to statute, the "special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) As a result, we will not presume implied findings in favor of a judgment that is based on a special verdict because "'there is no such presumption in favor of upholding a special verdict. Rather a special verdict's correctness must be analyzed as a matter of law. [Citation.]"' (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366.) The special verdict form did not contain express findings that ASI's managing agents authorized or ratified Kassenborg's conduct. We conclude that the special verdict is legally deficient on its face to support an award of punitive damages against ASI, a corporate defendant, pursuant to the clear language set forth in Civil Code section 3294, subdivision (b).

DISPOSITION

The punitive damages are reversed. In all other respects, the judgment is affirmed. ASI shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ